2-317

Supreme Court, U. S.
FILED
AUG 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1972

NO. 72 - 317

AMANDO GOMEZ,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

J. KENNETH JENSEN
Attorney at Law
7917 Ivanhoe Avenue
La Jolla, California 92037

Counsel for Petitioner

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1972

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7917 Ivanhoe Avenue
La Jolla, California 92037

Counsel for Petitioner

TABLE OF AUTHORITIES

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1.	Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 817	2, 8
2.	Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889	2, 8
3.	28 U.S. Code § 1257(3)	2
4.	15 U.C.L.A. Law Review 1499 at 1533-1535	9

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of The State of California

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PETITIONER prays that a Writ of of Certiorari issue to review the Judgment of the Supreme Court of the State of California denying Petitioner a hearing July 19, 1972.

DENIAL OF A HEARING

A copy of the Denial of the Hearing by the California Supreme Court is appended to this petition.

JURISDICTION

Petitioner's request for hearing by the California Supreme Court was denied July 19, 1972. The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code § 1257 (3).

QUESTION PRESENTED

Whether the warrantless search and arrest of Petitioner conflicts with his rights guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 and Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

At a preliminary examination held April 18, 1972, before Magistrate Wesley B. Buttermore, Jr., an air freight agent named William H. Wisnoski testified that he accepted a package for shipment to Seattle, Washington and observed the shipper drive off, alone, in a green car with a luggage rack, but he did not see the license number. (Rptr. Trans. pp. 33) After the shipper left, he cut the box open and discovered packages of pills. Then, he called agent McLaughlin of the California State Bureau of Narcotics who came to the Air Freight Office and examined the box and its contents.

Agent McLaughlin testified that in the

course of his investigation he obtained a telephone number of a Janice Williamson listed at 4772 - 34th Street, Apartment 8, San Diego.

The following morning at 8:00 A. M., agent McLaughlin in the company of other officers, parked up the street from 4772 34th Street, Apartment 8, purportedly to observe in the parking area of that apartment complex a green Datsun automobile with a luggage rack. However, they were unable to observe the apartment or persons who might come to or go from the apartment because of their position. (pp. 75-78) After waiting nearly six hours, without any attempt to obtain a search warrant, agent McLaughlin went to the apartment and knocked or rang the doorbell. (pp. 41-42) Petitioner peered out of the window and then opened the door. Agent McLaughlin identified himself and Petitioner attempted

to close the door but agent McLaughlin forced his way inside because he thought he smelled the odor of burnt marijuana. (pp. 42) Although he admitted he has been mistaken in the past in identifying the odor of marijuana. (pp. 87) In fact, he testified that tobacco cigarettes have smelled like marijuana. (pp. 86)

Upon entering the apartment, agent McLaughlin saw other persons rapidly moving about and in his pursuit of the other occupants, observed a small amount of marijuana and pills lying on the kitchen table. All three occupants, including Petitioner, were arrested. However, there was no contraband on the person of any of the suspects (pp. 91) and no cigarettes were lighted or burning. (pp. 94)

On June 2, 1972, Petitioner's motion to suppress the evidence seized was heard in the San Diego Superior Court, before Judge William A. Yale. At the hearing, Richard

Whalley was duly qualified and testified he is employed by both the prosecution and the defense to testify in the Superior Court as a forensic chemist. In his expert opinion, the odor of burning marijuana is similar to other vegetable matter, including tobacco. He also testified, that odor without more is a highly subjective determination and even experts are sometimes mistaken when making a determination merely on odor.

On August 7, 1972 in the Federal District Court, Southern District of California, a motion to suppress evidence pursuant to Rule 41(e) of the Rules of Federal Procedure was held before Judge Leland C. Nielsen in the case The United States vs. Enrica Bernald-Peralta, Case No. 13349. At that hearing U.S. Customs Agent Frecker stopped the defendant at an alien checkpoint in Niland, California. Agent Frecker ordered the defendant to open the trunk of his automo-

bile, although there was nothing unusual about the trunk. He claimed he smelled marijuana. Agent Frecker testified that he had training to detect the odor of marijuana although he admitted at the hearing that the odor could have been produced by "a passing wind". Agent Frecker further testified the odor of marijuana was specific and unlike any other odor. However, the specificity of the smell was contradicted by the testimony of forensic chemist Richard Whalley.

Although a search of defendant's car uncovered packages of cocaine in the door panels, no marijuana was found in the car or on the person of the defendant.

Judge Nielsen, in granting the motion to suppress, determined that no marijuana was found and the smell was a "bogus smell".

Copies of requests by Petitioner to

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Although a search of defendant's car uncovered packages of cocaine in the door panels, no marijuana was found in the car or on the person of the defendant.

Judge Nielsen, in granting the motion to suppress, determined that no marijuana was found and the smell was a "bogus smell".

Copies of requests by Petitioner to

forward to this Court transcripts of the preliminary examination and two hearings referred to are appended.

REASONS FOR GRANTING THE WRIT

The warrantless search of the residence by the police was justified only on a sense of smell. An innocent odor can often be mistaken for a guilty one and where events are as consistent with innocent activity as criminal activity even a detention by the police based on those events is unlawful and violates the Fourth and Fourteenth Amendments of the Constitution of the United States, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917.

In fact, forensic chemist Richard Whalley testified police officers had mistakenly made marijuana arrests for

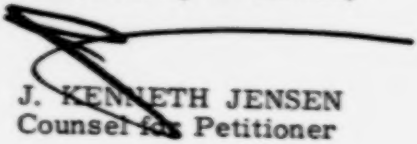
innocent botanical materials. Odor coupled with some experience should be no more justification for a search or detention than furtive conduct coupled with some experience. In 15 U.C.L.A. Law Review 1499 at 1533-1535 permitting this justification "provide the police officer with an almost irrefutable method to 'write in' a probable cause...".

Even the most acute sense of smell might be misleading. Of course, officers may rely upon their sense of smell to confirm suspicions of already visible contraband, but the appearance of something visible can be weighed objectively to determine whether or not a reasonable or prudent man would consider it suspicious. A sense of smell cannot be measured by any objective legal standard. For any officer to proceed on such evaluation without more, is subject to great abuse and fabrication.

Therefore, Petitioner requests this

Court to issue a Writ of Certiorari to redress his grievances.

Respectfully submitted,



J. KENNETH JENSEN
Counsel for Petitioner

IN THE SUPREME COURT OF

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October Term, 1972

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AMANDO GOMEZ,

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Respondents.

CERTIFICATE OF SERVICE

I, J. KENNETH JENSEN, being first duly sworn, depose and say:

I hereby certify on August 22, 1972 a copy of this petition for a Writ of Certiorari was mailed, postage prepaid, to Respondents Edwin L. Miller, Jr., San Diego District

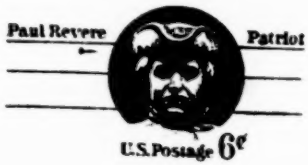
Attorney, the California Supreme Court and the Superior Court of San Diego County. I further certify that all parties required to be served have been served.

J. KENNETH JENSEN
Counsel for Petitioner

Duly witnessed and sworn before me this 1st day of August, 1972.

NOTARY PUBLIC

APPENDIX



J. Kenneth Jensen, Esq.

7917 Ivanhoe Avenue

La Jolla, CA 92037

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 19 1972

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 4 Civ. *No.* 11384

Gomez

vs.

San Diego Superior Court

Respectfully,

G. E. BISHEL
Clerk

63064-877 8-72 3M OSP

J. KENNETH JENSEN
ATTORNEY AT LAW
7917 IVANHOE AVENUE
LA JOLLA, CALIFORNIA
TELEPHONE 459-2993

August 21, 1972

Dorothy Albright
Court Reporter
U.S. Courthouse Building
325 West "F" Street
San Diego, California 92101

Re: U.S. v. Bernald-Peralta
Case No. 13349

Dear Mrs. Albright:

I have petitioned the United States Supreme Court for a Writ of Certiorari and request you to furnish that Court with a transcript of the proceedings before Judge Nielsen pursuant to a motion to suppress evidence heard August 7, 1972 in the above referenced case.

Very truly yours,

J. KENNETH JENSEN

JKJ/ed

J. KENNETH JENSEN
ATTORNEY AT LAW
7917 IVANHOE AVENUE
LA JOLLA, CALIFORNIA
TELEPHONE 459-2993

August 21, 1972

Clerk's Office
California Supreme Court
4250 State Building
San Francisco, California 94102

Re: Gomez vs. San Diego Superior Court
No. 4 Civ. 11384
Hearing Denied July 19, 1972

Dear Sir:

I have petitioned the United States Supreme Court for a Writ of Certiorari to review the California Supreme Court's denial of Mr. Gomez's request for hearing. Please forward to that Court copies of the transcripts of the preliminary examination and motion to suppress evidence heard in the San Diego Municipal and Superior Court which I had furnished when I petitioned for appellate review the Superior Court's denial of his motion.

Very truly yours,

J. KENNETH JENSEN

JKJ/ed

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Court of Appeal - Fourth Dist.

FILED

SEP 20 1961

JOHN R. McDOWELL, Clerk

DIVISION ONE

MARY GOMEZ, Petitioner, vs. SUPERIOR COURT ETC., COUNTY OF SAN DIEGO, Respondent, PEOPLE, ETC., Real Party in Interest.	4 Civil NO. 11364 SUPERIOR COURT NO. CR-26237

IN THE COURT:

The petition for writ of prohibition is denied.

_____ P.J.

Copies to: J. Kenneth Jameson-La Jolla
District Attorney-SD
Superior Court-SD